

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the matter of	)	
	)	
EMR Consulting, Inc.	)	
Motion to Set Aside the Grant of Extended	)	File No. 0002221713
Construction Period for 800 MHz Public Safety	)	
Station WPYE521, City of Terre Haute, Indiana	)	

**ORDER**

**Adopted: March 7, 2007**

**Released: March 7, 2007**

By the Deputy Chief, Policy Division, Public Safety and Homeland Security Bureau:

**I. INTRODUCTION**

1. In this order, we deny the Motion to Set Aside (Motion), as supplemented, filed by EMR Consulting, Inc. (EMR) seeking set aside of the Commission's grant of extended construction authority for 800 MHz public safety station WPYE521 licensed to the city of Terre Haute, Indiana (the City). As explained below, denial is warranted because of EMR's failure to establish a *prima facie* case for the relief sought in the Motion.

**II. BACKGROUND**

2. On October 17, 2005, EMR filed its Motion seeking set aside of the Commission's September 16, 2005 extension of the City's construction period for station WPYE521.<sup>1</sup> On December 1, 2005, EMR filed a Supplement to Motion to Set Aside and Further Request for Investigation and Order to Show Cause (Supplement).<sup>2</sup> In the Motion and Supplement EMR alleged, *inter alia*, that the City had misrepresented material facts and demonstrated lack of candor in its request for extension of the stations construction period and in previous submissions to the Commission.<sup>3</sup> EMR also alleged that a principal of Commercial Radio Services, Inc. (CRS), owner of the tower on which station WPYE521 was to be located, was a convicted felon who colluded with the City in the alleged misrepresentation and lack of candor associated with the extension request and prior filings.<sup>4</sup> EMR accompanied its Supplement with a collection of application filings and other documents related to station WPYE521 that EMR had

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<sup>1</sup> EMR, a corporation, claims standing to file its Motion because it is a "resident of Terre Haute, Indiana." Motion at 1. Its standing is at best problematic. See *AT&T Wireless PCS, Inc., Order*, 15 FCC Rcd 4587, 4588 ¶ 3 (WTB CWD 2000), citing *Sierra Club v. Morton* 405 U.S. 727, 733 (1972). However, we believe the public interest would be served by putting to rest the serious allegations that EMR has raised against the City and we therefore do not reach the standing issue.

<sup>2</sup> EMR requested that its December, 2005 Supplement be afforded confidential treatment pursuant to Section 0.459 of the Commission's rules, 47 C.F.R. § 0.459. However, EMR later withdrew the confidentiality request. See Letter to Scot Stone, Wireless Telecommunications Bureau, Federal Communications Commission, from Robert H. Schwaninger, Jr., counsel for EMR, dated April 21, 2006.

<sup>3</sup> Motion at 1, 6.

<sup>4</sup> Supplement at 6, 12.

reproduced from the Commission's publicly available Universal Licensing System.<sup>5</sup> The Supplement also contained copies of official records from state and federal courts establishing that a CRS principal, Timothy M. Doty, had been convicted of two felonies.<sup>6</sup>

3. In evaluating the EMR filings, Commission staff took note of the documents establishing Timothy M. Doty's felony convictions and, upon independent examination of applications filed by CRS on its own behalf, found that CRS had falsely represented in applications filed with the Commission that neither it nor its principals had been convicted of a felony.<sup>7</sup> Accordingly, on August 30, 2006, the Commission issued CRS and one of its principals, Timothy M. Doty, an *Order to Show Cause* why its land mobile licenses and Timothy M. Doty's General Radiotelephone Operator license and amateur radio station and operator license should not be revoked.<sup>8</sup> The Commission is prosecuting the *Show Cause Order* separately. Accordingly, the instant order is confined to the allegations that EMR raised against the City.

### III. DISCUSSION

4. Evaluation of the EMR filings shows that, with the exception of the records establishing Timothy M. Doty's felony convictions, the documents in the Supplement establish only that the City filed

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<sup>5</sup> The Supplement also included other documents related to construction of the City's public safety radio system, e.g., the City's Request for Proposal (RFP) and CRS's bid in response to the RFP. *See Supplement, Exhibits 5, 7.*

<sup>6</sup> The Supplement included a printed report of a search of the records of the State of Indiana Vigo Superior Court, Division 5, stating that Timothy M. Doty had been convicted of felony possession of a controlled substance. It also included a copy of a Judgment in a Criminal Case from the United States District Court for the Southern District of Indiana, establishing that Timothy M. Doty was adjudged guilty of violating 18 U.S.C. § 2512(1)(b), Manufacturing and Possessing Electronic Devices for Interception of Electronic Communications, a felony.

<sup>7</sup> *See, e.g.,* Application for Mobile Radio Service Authorization, FCC Form 600 (for new station), File No. D122642, filed March 1, 1999; FCC Application for Wireless Telecommunications Bureau Radio Service Authorization, FCC Form 601, (for modification of license of Station WNGE348), File No. 253365, filed Sept. 29, 2000. *See also* FCC Application for Wireless Telecommunications Bureau Radio Service Authorization, FCC Form 601 (For renewal-Only of Station WNIL729), File No. 1375615, filed July 8, 2003; FCC Application for Wireless Telecommunications Bureau Radio Service Authorization, FCC Form 601 (for renewal-only of Station WPCJ772), File No. 1524776, filed Nov. 24, 2003; FCC Application for Wireless Telecommunications Bureau Radio Service Authorization, FCC Form 601 (For renewal-only of Station WPNU312), File No. 1740183, filed May 18, 2004; FCC Application for Wireless Telecommunications Bureau Radio Service Authorization, FCC Form 601 (for renewal-only of Station WNGE348), File No. 2067489, filed March 4, 2005; and FCC Application for Wireless Telecommunications Bureau Radio Service Authorization, FCC Form 601 (for renewal-only of Station WNDS861), File No. 2316369, filed September 15, 2005. *See also* Commercial Radio Service, Inc. Licensee of Private Land Mobile Stations WNDS861, Reelsville, Indiana; WNIL729, Paxton, Indiana; WPCJ772, West Terre Haute, Indiana; and WPNU312 Greencastle, Indiana/West Terre Haute, Indiana; Licensee of Commercial Land Mobile Station WNGE348, West Terre Haute, Indiana; Timothy M. Doty, Licensee of General Radiotelephone Operator License PG1814366; and Amateur Radio Operator and Licensee of Amateur Radio Station WB9MDC, West Terre Haute, Indiana. EB-Docket No. 06-168, *Order to Show Cause*, 21 FCC Rcd 9983, 9984 (2006) (*Show Cause Order*). ["Renewal-only applications are streamlined applications for licensees that seek to renew their authorizations and do not need to update any information previously provided relating to, among other things, basic qualifying information, including felony convictions. If updates are required, renewal applicants must indicate as much and file renewal/modification applications instead. (Footnote omitted.) Under the Commission's Universal Licensing System, renewal-only applications do not require licensees to provide information relating to felony convictions. Renewal/modification applications, by contrast, do require licensees to provide information about felony convictions. (Footnote omitted.) By filing renewal-only applications rather than renewal/modification applications, CRS failed to provide information to the Commission about Mr. Doty's felony convictions that it was otherwise required to disclose."]

<sup>8</sup> *Show Cause Order, supra*, note 7.

the application for WPYE521, issued a request for bids for system construction, received a bid from CRS, was granted a license and subsequently filed requests for extension of construction period. There is nothing in the Supplement that directly or indirectly supports the Motion's or Supplement's allegations that the City engaged in misrepresentation or lack of candor.

5. When the Commission evaluates claims of misrepresentation and lack of candor such as those raised in the Motion and Supplement, it looks to the record to determine whether the movant has established a *prima facie* case of licensee misconduct.<sup>9</sup> In so doing, the Commission may take official notice of certain documents if they support the movant's allegations.<sup>10</sup> Otherwise, the movant must support its allegations with an affidavit or affidavits from a person with personal knowledge of facts sufficient to establish the alleged misconduct.<sup>11</sup>

6. Here, we take official notice of the ULS records furnished with the Supplement but find nothing therein that can be construed as misrepresentation or lack of candor. The records establish only the sequence of the City's filings and the reasons that the City advanced in support of its extension requests. Although EMR claims the City is engaged in a "conspiracy" with CRS,<sup>12</sup> EMR questions the City's motives for filing the extension requests<sup>13</sup> and alleges that the City's representations in support of the extension requests are untrue,<sup>14</sup> there is nothing on the face of the records that supports EMR's claims.

7. EMR's Motion contains a "verification"<sup>15</sup> from Ms. Sandra Black to the effect that the "facts and circumstances provided" in the Motion are "true and correct to the best of my information and belief." (Emphasis supplied). Ms. Black's verification falls far short of the Commission's requirement for an affidavit from a person with "personal knowledge" of the facts offered in support of allegations against a licensee.<sup>16</sup> It is well settled that affidavits supporting allegations of licensee misconduct which "consist of ultimate, conclusory facts or more general allegations on information and belief, supported by general affidavits . . . are not sufficient" to establish a *prima facie* case of misrepresentation or lack of candor.<sup>17</sup> Accordingly, we are denying the Motion and Supplement because of the lack of evidentiary support for the allegations made therein.

#### IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 1.939 of the Commission's rules, 47 C.F.R. § 1.939 and Sections 4(i) and 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d)(1), the Motion to Set Aside, filed by EMR Consulting, Inc. on October 17, 2005,

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<sup>9</sup> See 47 U.S.C. § 309(d)(1).

<sup>10</sup> See *id.*

<sup>11</sup> *Id.*

<sup>12</sup> Supplement at 7.

<sup>13</sup> See Motion at 5.

<sup>14</sup> See *id.* at 6.

<sup>15</sup> Section 1.16 of the Commission's rules, 47 C.F.R. § 1.16, allows a declaration under penalty of perjury in lieu of an affidavit. For the purposes of the instant order, we will conclude that Ms. Black intended her "verification" to be a declaration pursuant to Section 1.16. As noted *supra* however, the verification fails even when so considered.

<sup>16</sup> 47 C.F.R. § 1.939(d). See 47 U.S.C. § 309(d)(1).

<sup>17</sup> Application of North Idaho Broadcasting Co. for Transfer of Control of KVNI(AM), Coeur D'Alene, Idaho and for Assignment of Construction Permit of KKCH(FM), Hayden, Idaho, *Memorandum Opinion and Order*, 8 FCC Rcd 1637, 1638 ¶ 8 (1993), quoting *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987).

and the Supplement to Motion to Set Aside and Further Request for Investigation and Order to Show Cause, filed by EMR Consulting, Inc. on December 1, 2005, to the extent that said pleadings allege misconduct by the City of Terre Haute or its officials and request set aside of the WPYE521 license, ARE DENIED WITH PREJUDICE.

9. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm  
Deputy Chief, Policy Division  
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